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# C-Ampy Construction Sdn Bhd v Andalas Jaya Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO N-02–269–01 OF 2012

ABDUL MALIK ISHAK, ABDUL WAHAB PATAIL AND CLEMENT SKINNER JJCA

19 DECEMBER 2013

*Arbitration — Agreement — Reference of dispute — Subcontract — Parties involved in project to build industrial factories — Dispute regarding payment for work done — Dispute referred to arbitration — Counterclaim in arbitration proceedings — Potential contingent liability arising from breach of subcontract — Arbitrator made order for payment to stakeholder — Application to High Court against order of arbitrator — Third party proceedings for indemnity — Whether application time-barred*

The respondent was the main-contractor for a project to build industrial factories owned by a company known as Prestajaya Sdn Bhd while the appellant was the subcontractor of the respondent engaged to, inter alia, build a bridge for the project. A dispute arose between the appellant and the respondent regarding payment for work done, which was referred to arbitration. In the arbitration proceedings, the respondent counterclaimed against the appellant. The arbitrator made an award in favour of the appellant in the sum of RM287,669.40, rejected the respondent's counterclaim for indemnity but ordered that the monies be paid to a stakeholder. The arbitrator also made a finding that there was potential contingent liability arising from the breach of sub contract due to encroachment into Lot PT 8625 and the said encroachment was the subject matter of the civil suit. Being dissatisfied with the arbitrator's order for payment to a stakeholder, the appellant made an application to the High Court which resulted in the arbitrator amending the award to delete the order to pay such monies due to a stakeholder and re-dated the award to 3 December 2004. The respondent brought third party proceedings against the appellant for indemnity in the civil suit. The respondent issued a statement of claim against the appellant as the fourth party in the third party proceedings. The appellant did not receive any payment from the respondent after the expiry of 14 days of the amended award. The respondent opposed the appellant's application on the ground that it was time barred under s 6(c) of the Limitation Act 1953 ('Act') which stated that actions to enforce an award shall not be brought after the expiration of six years from the date on which the cause of action accrued. It was the respondent's case that the appellant became entitled to enforce the amended award 14 days after its making on 3 December 2004 and the six years within which to bring action on the award expired on 16 December 2010, but the appellant's originating

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summons having been filed on 27 April 2011, was out of time by some four months. The appellant contended that its application was not time-barred as there was an acknowledgement of the claim within the meaning of s 26(2) of the Act. The judge accordingly dismissed the appellant's application. Hence, the present appeal.

**Held**, allowing the appeal with costs of RM8,000:

(1) The provisions of s 26 of the Act regarding a fresh accrual of action on an acknowledgment of a claim must be read together with two other sections, namely, s 27(1) which states that such acknowledgement shall be in writing and signed by the person making the acknowledgment, and s 27(2) which states that such acknowledgment may be made by an agent of the person making the acknowledgment (see para 19).

(2) The request to put the arbitrator's final award in the agreed and admitted part of the common bundle was a conscious effort made by the solicitors since it suited the appellant's purpose, in that, it has been held that once a document is found in the 'agreed and accept' part of the bundle of documents, not only is formal proof of the making of the documents not required, the truth of the contents of the document is agreed to (see para 24).

(3) The fact that the appellant may have wanted the letter put in a different part of the agreed bundle of documents does not detract in any way from the fact that the request in the respondent's solicitors' letter constituted an acknowledgment, which for the purposes of s 27(2) sufficed since it was the acknowledgment of the agent of the person making the acknowledgment that was relevant under the sub-section (see para 26).

(4) A right of action was deemed to have accrued from the date of the statement of claim which was dated 22 June 2007 or from the date of the respondent's solicitors' letter dated 30 March 2009. Therefore the appellant's application was well within the six years limitation period. With regard to the appellant's reliance on estoppel, the court agreed with the trial judge that by raising the plea for the first time only in its affidavit in reply, the respondent had effectively been deprived of the opportunity to respond to it. Therefore, it would be unfair to allow the appellant to take the point (see paras 27 & 28).

**[Bahasa Malaysia summary**

Responden adalah kontraktor utama untuk suatu projek membina kilang industrial yang dimiliki oleh sebuah syarikat yang dikenali sebagai Prestajaya Sdn Bhd manakala perayu adalah subkontraktor kepada responden yang terlibat untuk, antara lain, membina sebuah jambatan untuk projek tersebut. Satu pertikaian timbul antara perayu dan responden berkaitan bayaran untuk kerja yang disiapkan, yang mana telah dirujuk kepada timbang tara. Dalam

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prosiding timbang tara, responden menuntut balas terhadap perayu. Penimbang tara telah membuat award memihak kepada perayu dengan jumlah sebanyak RM287,669.40, menolak tuntutan balas responden untuk indemniti tetapi memerintahkan bahawa wang itu dibayar kepada pemegang saham. Penimbang tara juga membuat dapatan bahawa terdapat potensi liabiliti kontingen yang timbul daripada kemungkiran subkontrak disebabkan oleh cerobohan ke dalam Lot PT 8625 dan cerebohan itu adalah perkara pokok guaman sivil. Tidak berpuas hati dengan perintah penimbang tara bagi bayaran kepada pemegang saham, perayu membuat permohonan ke Mahkamah Tinggi yang mana menyebabkan penimbang tara meminda award untuk mengeluarkan perintah untuk membayar wang tertunggak kepada pemegang saham dan menukar tarikh award kepada 3 Disember 2004. Responden membawa prosiding pihak ketiga terhadap perayu untuk indemniti dalam guaman sivil. Responden mengeluarkan satu pernyataan tuntutan terhadap perayu sebagai pihak keempat dalam prosiding pihak ketiga. Perayu tidak menerima apa-apa bayaran daripada responden selepas tamat tempoh 14 hari pemindaan award. Responden membantah permohonan perayu atas alasan ia adalah terhalang oleh had masa di bawah s 6(c) Akta Had Masa 1953 ('Akta') yang menyatakan bahawa tindakan-tindakan untuk menguat kuasakan award tidak boleh dibawa selepas enam tahun tamat tempoh daripada tarikh yang mana kausa tindakan bermula. Adalah kes responden bahawa perayu berhak untuk menguat kuasakan award terpinda 14 hari selepas dibuat pada 3 Disember 2004 dan enam tahun di mana untuk mengambil tindakan berkaitan award itu tamat pada 16 Disember 2010, tetapi saman pemula perayu telah difailkan pada 27 April 2011, adalah terlebih had masa lebih kurang empat bulan. Perayu menegaskan bahawa permohonannya tidak terhalang oleh had masa kerana terdapat pengesahan kepada tuntutan dalam maksud s 26(2) Akta. Hakim menolak permohonan perayu dengan sewajarnya. Maka, rayuan ini.

**Diputuskan**, membenarkan rayuan dengan kos sebanyak RM8,000:

(1) Proviso s 26 Akta berkenaan permulaan baru tindakan pada pengesahan terhadap suatu tuntutan hendaklah dibaca bersama dengan dua seksyen yang lain, iaitu, s 27(1) yang menyatakan bahawa pengesahan itu hendaklah bertulis dan ditandatangani oleh orang yang membuat pengesahan, dan s 27(2) yang menyatakan bahawa pengesahan itu boleh dibuat oleh ejen kepada orang yang membuat pengesahan (lihat perenggan 19).

(2) Permintaan untuk meletakkan award akhir penimbang tara di dalam ikatan yang dipersetujui dan diterima adalah usaha sedar yang dibuat oleh peguamcara kerana ia sesuai dengan tujuan perayu, yang di dalamnya, ia telah diputuskan bahawa apabila suatu dokumen didapati dalam bahagian 'agreed and accept' ikatan dokumen, bukan saja pembuktian formal pembuatan dokumen tidak diperlukan, kebenaran

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kandungan dokumen adalah dipersetujui (lihat perenggan 24).

(3) Fakta bahawa perayu mungkin mahu untuk meletakkan surat dalam bahagian lain ikatan dokumen yang dipersetujui tidak menjejaskan dalam apa-apa cara daripada fakta bahawa permintaan di dalam surat peguamcara responden merupakan pengesahan, yang mana untuk tujuan s 27(2) mencukupi kerana ia adalah pengesahan daripada ejen kepada orang yang membuat pengesahan yang relevan di bawah sub-seksyen itu (lihat perenggan 26).

(4) Hak tindakan dianggap telah terakru dari tarikh penyata tuntutan yang bertarikh 22 Jun 2007 atau daripada tarikh surat peguamcara responden bertarikh 30 Mac 2009. Oleh itu permohonan perayu adalah dalam enam tahun tempoh had masa. Berkenaan dengan pergantungan perayu terhadap estopel, mahkamah bersetuju dengan hakim perbicaraan bahawa dengan menimbulkan pli untuk kali pertama hanya dalam afidavit balasan, responden secara efektif telah dihalang peluang untuk membalasnya. Oleh itu, adalah tidak adil untuk membenarkan perayu mendapat mata (lihat perenggan 27 & 28). ]

**Notes**

For cases on reference of dispute, see 1(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 1597–1614.

**Cases referred to**

*Good Challenger Navegante SA v Metal Export Import SA* [2003] Lloyd's Rep 471, CA (refd)

*Jaafar bin Shaari & Anor (suing as Administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693, SC (refd)

*Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54, FC (refd)

**Legislation referred to**

Arbitration Act 1952 s 27

Limitation Act 1953 ss 6(c), 26, 26(2), 27(1), (2)

**Appeal from:** Originating Summons No 24(M)-573 of 2011 (High Court, Seremban)

*Oon Chee Kheng (Ti Chin Chu Ann with him)(C K Oon & Co) for the appellant.*
*Richard Kok (Rhiza & Richard) for the respondent.*

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**Clement Skinner JCA (delivering judgment of the court):**

INTRODUCTION

**[1]** We had earlier heard the appeal of C-Ampy Construction Sdn Bhd ('the appellant') against the decision of the High Court, Seremban given on the 2 February 2012, dismissing the appellant's application for leave to enforce an arbitrator's award against Andalas Jaya Sdn Bhd ('the respondent').

**[2]** After hearing the appeal we allowed it. These are our reasons for doing so.

THE FACTS

**[3]** The respondent was the main-contractor for a project to build industrial factories owned by a company known as Prestajaya Sdn Bhd. The appellant was the sub contractor of the respondent engaged to, inter alia, build a bridge for the project.

**[4]** A dispute arose between the appellant and respondent regarding payment for work done, which was referred to arbitration. In the arbitration proceedings the respondent had counterclaimed against the appellant:

(a) for a full indemnity against the claim by Prestajaya Sdn Bhd in Seremban High court Civil Suit No 22–11 of 2002 ('the civil suit') where the respondent was joined as a third party, because the bridge constructed by the appellant was misaligned and encroached onto other factories; and

(b) for an order that in the event the respondent is liable to pay the appellant any moneys in respect of the subcontract, such sum be held by a stakeholder pending the disposal of the civil suit.

**[5]** On 15 April 2003 the arbitrator made an award in favour of the appellant in the sum of RM287,669.40, rejected the respondent's counterclaim for indemnity but ordered that the moneys be paid to a stakeholder. The arbitrator also made a finding that, 'There is potential contingent liability arising from the breach of sub contract due to encroachment into lot PT 8625', and the said encroachment 'is the subject matter of' the civil suit.

**[6]** Being dissatisfied with the arbitrator's order for payment to a stakeholder, the appellant made an application to the High Court which resulted in the arbitrator amending the award to delete the order to pay such moneys due to a stakeholder and re-dated the award to 3 December 2004.

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**[7]** The respondent brought third party proceedings against the appellant for indemnity in the civil suit. The respondent issued a statement of claim against the appellant (as 'fourth party') in the third party proceedings.

**[8]** The appellant did not receive any payment from the respondent after the expiry of 14 days of the amended award dated 3 December 2004.

**[9]** On 27 April 2011 the appellant filed its application for leave to enforce the arbitral award by way of an originating summons pursuant to s 27 of the Arbitration Act 1952 .

## THE HIGH COURT DECISION

**[10]** The respondent opposed the appellant's application on the ground that it was time barred under s 6(c) of the Limitation Act 1953 which states that actions to enforce an award shall not be brought after the expiration of six years from the date on which the cause of action accrued.

**[11]** It was the respondent's case that the appellant became entitled to enforce the amended award 14 days after its making on 3 December 2004 and the six years within which to bring action on the award expired on 16 December 2010, but the appellant's originating summons having been filed on 27 April 2011, was out of time by some four months.

**[12]** The appellant contended that its application was not time barred as there was an acknowledgement of the claim within the meaning of s 26(2) of the Limitation Act which in its relevant parts read:

> Fresh accrual of action on acknowledgment or part payment 26(2) Where any right of action has accrued to recover any debt or other liquidated pecuniary claim, ... and the person liable or accountable therefor acknowledges the claim ... , the right shall be deemed to have accrued on and not before the date of the acknowledgment or the last payment ...

**[13]** The appellant contended that the respondent had made an acknowledgment within the meaning of s 26(2) when:

(a) the respondent pleaded in para 13 of its statement of claim in the third party proceedings in the civil suit, as follows:

> 13 Pihak ketiga dan pihak keempat telah merujuk pertelingkahan seperti di atas kepada 'Arbitrator' dan adalah penemuan Arbitrator bahawa pihak keempat memungkiri kontrak tersebut dan tidak menjajarkan (misaligned) jambatan dan benteng dan lanjutan dari itu jambatan dan benteng tersebut menceroboh ke dalam tanah plaintif.

(b) In those third party proceedings, the solicitors acting for the respondent

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had written a letter dated 30 March 2009 to the appellant's solicitors regarding the preparation of the common bundle of documents in the civil suit. The respondent's solicitors agreed to prepare the common bundle of documents and proposed that:

(c) All documents in the Ikatan *Dokumen Pihak Ketiga* be placed in Part 1 ie *Dipersetujui dan Diakui*

(d) ...

(e) ...

(f) The final award of the Arbitrator dated 3 December 2004 be placed in Part 1 of the Common Agreed Bundle.

**[14]** Apart from the above two 'acknowledgments', the appellant also contended that the respondent should be estopped from relying on limitation as the appellant had withheld or delayed enforcing the arbitrator's award at the respondent's request until the conclusion of the civil suit.

**[15]** The respondent contended on the other hand that for an acknowledgment to be a valid acknowledgment, it must be an unequivocal acknowledgment (see *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54 (FC)). The respondent submitted at the High Court that the matters relied on by the appellant were not an acknowledgment of the respondent's indebtedness to the appellant — they did not unequivocally acknowledge any indebtedness whatsoever to the appellant.

**[16]** The respondent also contended that the doctrine of estoppel should not apply in this case as the assertion made by the appellant in support of its plea of estoppel are bare unsupported allegations of the conversation between counsel in the civil suit.

**[17]** The learned judge found that the evidence relied on by the appellant as constituting an 'acknowledgment' of its claim did not amount to an unequivocal admission of a debt owing under the arbitration award. The learned judge also found that the appellant had not made out a case in estoppel as the purported conversation between counsel was only raised for the first time in the appellant's affidavit in reply III which gave the respondent no opportunity to rebut the assertions relied on by the appellant.

**[18]** The learned judge accordingly dismissed the appellant's application.

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THIS APPEAL

**[19]** Before considering the merits of the appeal it should be mentioned that the provisions of s 26 of the Limitation Act regarding a fresh accrual of action on an acknowledgment of a claim must be read together with two other sections, namely, s 27(1) which states that such acknowledgement shall be in writing and signed by the person making the acknowledgment, and s 27(2) which states that such acknowledgment may be made by an agent of the person making the acknowledgment.

**[20]** Turning to the merits now, the reasons given by the learned judge for holding that para 13 of the statement of claim was not an acknowledgment within the meaning of s 26 of the Limitation Act was because paras 12 and 13 'merely made references to the arbitration proceedings and is not in response to a claim made by the (appellant) for the debt arising out of the said Final Award'. Likewise, in respect of the letter from the respondent's solicitors proposing to put the arbitrator's award in the agreed bundle of documents, the learned judge said the respondent's solicitors letter 'is merely an agreement that the Final Award be included in an agreed bundle of documents' and hence these two statements do not amount to an 'unequivocal admission' of a debt owing under the arbitration award.

**[21]** In our judgment the learned judge was plainly wrong in her finding. In our view para 13 of the statement of claim and the respondent's solicitors' letter of 30 March 2009 were not a 'mere reference' or a 'mere agreement'. They were far more than that.

**[22]** With reference to para 13 of the statement of claim, in the third party proceedings the respondent was seeking an indemnity from the appellant arising out of the allegedly faulty workmanship performed by the appellant when building the bridge, for which the respondent was now being sued in the civil suit. The appellant had tried to obtain an order of indemnity in the arbitration proceedings but failed. So the appellant was now seeking an indemnity through the third party proceedings. To make good its claim for indemnity the appellant had made deliberate reference in para 13 to the finding of the arbitrator in his final award regarding the respondent's breach of contract because that finding suited the respondent's purpose. In our judgment, implicit in the respondent's averment in para 13 regarding the arbitrator's finding is the acknowledgment that the final award is valid and binding on both the appellant and the respondent. The final award orders payment of RM287,669.40 to the appellant which is a subsisting debt. The respondent never pleaded any reservations regarding the arbitration proceedings or the findings made in the final award.

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**[23]** In our judgment for the purposes of s 26 of the Limitation Act the acknowledgement need not be explicit. It can be implicit. See *Good Challenger Navegante SA v Metal Export Import SA* [2003] Lloyd's Rep 471. In our judgment too, the implicit acknowledgment of the arbitration award in para 13 of the statement of claim was unequivocal. Learned counsel for the respondent has referred us to the case of *Wee Tiang Teng v Ong Chong Hooi & Anor* [1978] 2 MLJ 54 where the Federal Court held that for there to be a sufficient acknowledgment, 'the language of the debtor must amount to an unequivocal admission of a subsisting debt'. Relying on what was said in the above case learned counsel for the respondent submitted that 'implicit' acknowledgments have no application in our jurisdiction since the Federal Court in *Wee Tiang Teng* spoke of unequivocal admission. We do not agree. That is not what the Federal Court said in *Wee Tiang Teng*. What the Federal Court said was that the language must 'amount to' an unequivocal admission. Therefore implicit admissions are allowed but the admission must be unequivocal. As we said a moment ago, the implicit acknowledgment found in para 13 was unequivocal.

**[24]** With regard to the respondent's solicitors' letter of 30 March 2009, in our judgment it was not merely an agreement to put a document into an agreed bundle of document. In our view the request to put the arbitrator's final award in the 'Agreed and Admitted' part of the common bundle was a conscious effort made by the solicitors since it suited the appellant's purpose, in that, it has been held that once a document is found in the 'Agreed and Accept' part of the bundle of documents, not only is formal proof of the making of the documents not required, the truth of the contents of the document is agreed to (see *Jaafar bin Shaari & Anor (suing as Administrators of the estate of Shofiah bte Ahmad, deceased) v Tan Lip Eng & Anor* [1997] 3 MLJ 693). The appellant was no doubt seeking to rely on the finding of the arbitrator in the final award that the appellant was in breach of contract, so as to establish its claim for indemnity against the appellant in the civil suit.

**[25]** We note too that the respondent's solicitors' letter of 30 March 2009 expressed no reservation relating to the final award when requesting that it be put in the agreed and admitted part of the common bundle. We accordingly find the respondent had implicitly acknowledged the claim of the appellant constituted in the final award which remained valid and binding on the parties. The acknowledgment was also unequivocal.

**[26]** Learned counsel for the respondent drew attention to the fact that in the appellant's solicitors' letter of 1 April 2009 they had only agreed to the final award being placed in part 2 of the common bundle which is for documents which are agreed as to authenticity but not as to their contents which are disputed. In our view, the fact that the appellant may have wanted the letter put in a different Part of the agreed bundle of documents does not detract in any

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way from the fact that the request in the respondent's solicitors' letter constituted an acknowledgment, which for the purposes of s 27(2) suffices since it is the acknowledgment of the agent of the person making the acknowledgment that is relevant under the sub-section.

**[27]** For all the reasons given above, in our judgment the statements made in para 13 of the statement of claim and in the respondent's solicitors' letter of 30 March 2009 were acknowledgments of the claim of the appellant within the meaning of s 26(1) of the Limitation Act. A right of action is deemed to have accrued from the date of the statement of claim which was dated 22 June 2007 or from the date of the respondent's solicitors' letter dated 30 March 2009. Therefore the appellant's application was well within the six years limitation period.

**[28]** With regard to the appellant's reliance on estoppel, we agree with the learned judge that by raising the plea for the first time only in its affidavit in reply, the respondent had effectively been deprived of the opportunity to respond to it. Therefore it would be unfair to allow the appellant to take the point.

**[29]** It was for all the above reasons that we allowed the appeal with costs of RM8,000, set aside the decision of the High Court and ordered a refund of the deposit to the appellant.

*Appeal allowed with costs of RM8,000.*

Reported by Afiq Mohamad Noor